

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15<sup>th</sup> day of May, two thousand twenty-six.

PRESENT:

MYRNA PÉREZ,  
ALISON J. NATHAN,  
*Circuit Judges,*  
GARY S. KATZMANN,  
*Judge.\**

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TARA ALAMEDA, KAMECA BALAN, AND  
DEBBIE HAMELL-PALMER, ON THEIR  
OWN BEHALVES AND ON BEHALF OF A  
CLASS OF SIMILARLY SITUATED  
PERSONS,

*Plaintiffs-Appellants,*

v.

25-2531

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\* Judge Gary S. Katzmnn, of the United States Court of International Trade, sitting by designation.

ASSOCIATION OF SOCIAL WORK  
BOARDS,

*Defendant-Appellee.*\*\*

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**FOR PLAINTIFFS-APPELLANTS:**

MICHAEL H. SUSSMAN,  
ESQ., Sussman &  
Associates, Goshen, NY.

**FOR DEFENDANT-APPELLEE:**

JENNIFER ANCONA SEMKO,  
Baker & McKenzie LLP,  
Washington, DC.

Appeal from an order and judgment of the United States District Court for the Southern District of New York (Karas, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the District Court is **AFFIRMED AS MODIFIED**.

Plaintiffs-Appellants Tara Alameda, Kameca Balan, and Debbie Hamell-Palmer bring this putative class action against Defendant-Appellee the Association of Social Work Boards (“ASWB”). They allege discrimination on the basis of race and national origin in violation of Title VII, 42 U.S.C. § 1981, and the New York State Human Rights

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\*\* The Clerk of Court is respectfully directed to amend the caption as reflected above.

Law (“NYSHRL”). The District Court dismissed Plaintiffs’ federal claims and declined to exercise supplemental jurisdiction over their state claims. Plaintiffs appeal. We assume the parties’ familiarity with the underlying facts, the procedural history, and the issues on appeal, which we reference only as necessary to explain our decision to affirm as modified.

**I. Background**

ASWB develops and administers examinations to individuals seeking to obtain state licenses as Licensed Master Social Workers (“LMSW”) and Licensed Clinical Social Workers (“LCSW”). In New York, the state Education Department issues LMSW and LCSW licenses. New York requires individuals seeking to obtain either license to pass the relevant ASWB exam. At issue in this case are the LMSW and LCSW exams, which are two different tests.

Plaintiffs have each taken and failed ASWB exams multiple times. Alameda and Balan have each taken and failed the LMSW exam, and Hamell-Palmer has taken and failed the LCSW exam. As a result, they have been unable to obtain licenses from New York State and consequently lost out on opportunities for employment and career advancement.

Plaintiffs allege that Black and Hispanic/Latino individuals perform significantly

worse on the LCSW and LMSW exams than white test-takers. They further allege that ASWB has known about these racial disparities in testing outcomes for years yet has failed to modify their exams. Thus, Plaintiffs claim that ASWB intends for the LCSW and LMSW exams to produce better outcomes for white test-takers. Plaintiffs bring claims against ASWB alleging a pattern or practice of intentional discrimination under Title VII and Section 1981. They also bring a disparate impact claim under Title VII, as well as a state law claim under the NYSHRL. On ASWB's motion to dismiss, the District Court dismissed Plaintiffs' federal claims on their merits and declined to exercise supplemental jurisdiction over the NYSHRL claim. Plaintiffs appeal.

## **II. Standard of Review**

We review "*de novo* a district court's grant of a motion to dismiss, accepting the allegations in the complaint as true and drawing all reasonable inference in favor of the plaintiff." *Bugliotti v. Republic of Argentina*, 169 F.4th 344, 352 (2d Cir. 2026). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Mallett v. New York State Dep't of Corr. & Cmty. Supervision*, 126 F.4th 125, 131 (2d Cir. 2025) (quoting *Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir. 2009)). And we review the District Court's decision not to exercise supplemental jurisdiction for abuse of discretion. *See Delaney v. Bank of*

*America Corp.*, 766 F.3d 163, 170 (2d Cir. 2014).

### III. Discussion

#### A. Title VII

Plaintiffs' Title VII claims fail because Plaintiffs have not pled the requisite employer-employee relationship with ASWB.

Under Title VII, "it is 'an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Gulino v. New York State Educ. Dep't*, 460 F.3d 361, 382 (2d Cir. 2006) (alteration in original) (quoting 42 U.S.C. § 2000e-2(a)). In "'the typical Title VII case,'" there is "a direct employment relationship" between the plaintiff and the defendant. *Id.* at 374 (quoting *Ass'n of Mexican-American Educators v. California*, 231 F.3d 572, 603 (9th Cir. 2000) (Gould, J., dissenting)). Indeed, "the existence of an employer-employee relationship is a primary element of Title VII claims." *Id.* at 370; see also *Brown v. Daikin America, Inc.*, 756 F.3d 219, 226 (2d Cir. 2014) (same).

However, while "[t]he plausible existence of a requisite employer-employee relationship is [] a cornerstone of an adequately pled Title VII complaint," we have held

that “an employee is not squarely limited to claims against his or her *formal* employer.” *Felder v. United States Tennis Ass’n*, 27 F.4th 834, 838 (2d Cir. 2022). Most relevant here, we recognized in *Spirit v. Tchrs. Ins. and Annuity Ass’n* that a plaintiff may hold a third party liable under Title VII where her formal employer “has delegated one of its core duties to a third party.” *Gulino*, 460 F.3d at 377 (citing *Spirit v. Tchrs. Ins. & Annuity Ass’n*, 691 F.2d 1054, 1063 (2d Cir. 1982)); *see also Kern v. City of Rochester*, 93 F.3d 38, 45 (2d Cir. 1996) (characterizing the holding in *Spirit* as dependent in part on an employer having “delegated . . . its employment responsibilities” to the defendant). Plaintiffs argue that their Title VII claims fall within this exception. We disagree.

The Education Department, not Plaintiffs’ employers, issues LMSW and LCSW licenses. *See* N.Y. Educ. Law § 7700 et seq. And the Education Department, not Plaintiffs’ employers, requires Plaintiffs to pass the LMSW and LCSW exams in order to obtain the relevant licenses. Thus, in no sense have Plaintiffs’ employers delegated a core duty to ASWB. Nor is ASWB an agent of Plaintiffs’ past, present, or prospective employers. Plaintiffs therefore have failed to plead the requisite employer-employee relationship for purposes of Title VII.

#### **B. 42 U.S.C. § 1981**

Plaintiffs’ Section 1981 claim fails because they have not pled sufficient facts to

give rise to a plausible inference of intentional discrimination.

“Section 1981 provides that all persons ‘shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.’” *Felder*, 27 F.4th at 847–48 (quoting 42 U.S.C. § 1981). “‘To establish a claim under 42 U.S.C. § 1981,’ a plaintiff ‘must allege facts supporting’ that ‘(1) [the plaintiff is a] member[] of a racial minority; (2) defendant[‘s] intent to discriminate on the basis of race; and (3) discrimination concerning one of the statute’s enumerated activities.’” *Id.* at 848 (alterations in original) (quoting *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000)); see also *Comcast Corp. v. Nat’l Ass’n of African American-Owned Media*, 589 U.S. 327, 341 (2020). The District Court concluded that Plaintiffs failed to satisfy the second prong. We agree.

Plaintiffs’ relevant allegations consist almost exclusively of statistical evidence of disparate testing outcomes. “[T]o show discriminatory intent in a § 1981 . . . case based on statistics alone, the statistics must not only be statistically significant in the mathematical sense, but they must also be of a level that makes other plausible non-discriminatory explanations very unlikely.” *Burgis v. N.Y.C. Dep’t of Sanitation*, 798 F.3d 63, 69 (2d Cir. 2015). “As a general rule, ‘if the difference between the expected value

and the observed number is greater than two or three standard deviations, then the hypothesis that [the alleged discriminatory action was taken] without regard to race would be suspect.” *Id.* at 70 n.6 (alteration in original) (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n.14 (1977)); see also *Ottaviani v. State Univ. of New York at New Paltz*, 875 F.2d 365, 371–72 (2d Cir. 1989) (same).

Here, Plaintiffs have not alleged sufficiently stark disparities to meet this standard. As an initial matter, we reject Plaintiffs’ attempt to offer the results of the Rutgers Study—which analyzed only the LCSW exam—as relevant factual allegations with respect to the LMSW exam. Further, as to the LCSW exam, the differences in testing outcomes Plaintiffs have alleged are insufficient to “make[] other plausible non-discriminatory explanations very unlikely.” *Burgis*, 798 F.3d at 69. Finally, outside of these statistical disparities, Plaintiffs do not make any other concrete circumstantial allegations that would permit the inference that ASWB intended the differential testing outcomes revealed in the Rutgers Study.

### **C. NYSHRL Claim**

While Plaintiffs make arguments as to the merits of their NYSHRL claim, they do not contest the District Court’s decision not to exercise supplemental jurisdiction over this claim. Accordingly, we conclude that any challenge to this decision has been

waived. *See Hussein v. Maait*, 129 F.4th 99, 123 (2d Cir. 2025) (“[A]rguments not made in an appellant’s opening brief are waived even if the appellant pursued those arguments in the district court or raised them in a reply brief.” (quoting *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005))). In any event, given the early stage of this litigation, the District Court did not abuse its discretion by declining to exercise supplemental jurisdiction over Plaintiffs’ NYSHRL claim. *See Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006).

However, the District Court did not specify that it was dismissing Plaintiffs’ state claim without prejudice. *See Green v. Dep’t of Educ. of City of New York*, 16 F.4th 1070, 1074 (2d Cir. 2021) (“[D]ismissals for lack of subject matter jurisdiction ‘must be without prejudice, rather than with prejudice.’” (quoting *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 54 (2d Cir. 2016))). We therefore modify the District Court’s decision to specify that Plaintiffs’ NYSHRL claim is dismissed without prejudice. *See* 28 U.S.C. § 2106.

**IV. Conclusion**

We have considered Plaintiffs' remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the District Court **AS MODIFIED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court